

Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

Healthcare Litigation

Premises Liability Litigation

Product Liability Litigation

Professional Liability Litigation

Real Estate Litigation

Restaurant / Hospitality Litigation

Retail Litigation

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

U.S. Congress Contemplates Minimum Wage Hike

The Standing With Minimum Wage Earners Act of 2007 (S.2514) seeks to impose the following minimum wage increases, beginning on January 1, 2010:

Effective January 1, 2010: \$8.00 per hour

Effective October 1, 2010: \$8.75 per hour

Effective July 1, 2011: \$9.50 per hour

The bill would also require that beginning on July 1, 2012, the federal minimum wage would increase by a percentage equal to any pay increases received by members of Congress. Such increases would go in effect annually on July 1. This bill is currently in committee.

II.

JUDICIAL UPDATE

California Supreme Court Holds that Individual Employees Cannot be Personally Liable for Retaliation

In *Jones v. The Lodge at Torrey Pines Partnership*, the California Supreme Court ruled that although an employer may be held liable for retaliation, individual employees, including supervisors, may not be personally liable in such actions.

The California Fair Employment and Housing Act provides, in pertinent part, that it is unlawful for any “employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person” because the person has opposed any discriminatory or harassing workplace conduct or has filed a complaint, testified, or assisted in any claim or investigation of harassment or discrimination. In 1998, the California Supreme Court held that individual employees cannot be held personally liable for discrimination. In that case (*Reno v. Baird*), the Court reasoned that:

While it is possible to avoid making personnel decisions on a prohibited discriminatory basis, it is not possible either to avoid

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making personnel decisions or to prevent the claim that those decisions were discriminatory . . . An individual supervisory employee cannot refrain from engaging in the type of conduct which would later give rise to a discrimination claim. Making personnel decisions is an inherent and unavoidable part of the supervisory function. Without making personnel decisions, a supervisory employee simply cannot perform his or her job duties.

The Court added that “we do not decide merely whether individuals should be held liable for their wrongdoing, but whether all supervisors should be subjected to the ever-present threat of a lawsuit each time they make a personnel decision.” In *Jones*, the Court held that “all of these reasons for not imposing individual liability for discrimination . . . apply equally to retaliation. Indeed, some may apply even more forcefully through retaliation claims.”

Thus, unless the legislature enacts a statute that holds otherwise, individual employees will no longer face personal liability in retaliation cases.

Award of Attorneys’ Fees Must Be Reasonable

Generally, an employee who prevails on a claim for the recovery of overtime and/or other compensation for services rendered will be able to recover his or her “reasonable” attorneys’ fees as part of the judgment. In *Harrington v. Payroll Entertainment Services, Inc.*, a California court of appeal held that a request for \$46,000 in attorneys’ fees was “unreasonable” given the fact that the overtime claim at issue was worth only \$44.63. In restricting the award of attorneys’ fees to \$500, the court noted that the majority of the fees allegedly incurred by the plaintiff involved the pursuit of an ill-founded attempt to morph the claim into a class action. In limiting the attorneys’ fees awarded to the plaintiff, the court succinctly concluded: “At the risk of understatement there is no way on earth this case justified the hours purportedly billed by [the plaintiff’s] lawyers.”

Court Awards \$1,000,000 in Attorneys’ Fees Where Prevailing Plaintiff Only Recovers \$30,000 in Damages

In contrast to *Harrington v. Payroll Entertainment Services, Inc.*, a California court of appeal recently upheld a \$1,000,000 award of attorneys’ fees in an action where the prevailing employee only received \$30,000 in compensatory damages. The matter, *Harman v. City and County of San Francisco*, involved allegations of racial discrimination.

The court rejected the employer’s argument that the \$1,000,000 attorneys’ fees awarded to the plaintiff was grossly disproportional to the damages awarded, noting (among other things) that the matter took more than seven years to litigate.

Arbitration Provisions and Employee Handbooks Are Not Always Enforceable

In *Mitri v. Arnel Management Co.*, a California court of appeal refused to compel arbitration of an employee-employer dispute, holding that the arbitration provision contained within the employer’s employee handbook did not constitute an enforceable agreement. Important to note is the fact that the employee handbook’s arbitration provision specifically stated that employees would be

required to sign separate arbitration agreements. In this case, the employee had not done so. The court noted that the handbook provision might have been enforceable had it not specifically contemplated a separate signed agreement.

For this and other reasons, it is strongly suggested that employers wishing to avail themselves of mandatory arbitration utilize separate, complete arbitration agreements which are executed by both the employer and the employee.

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Definition of ADEA Charges

In *Federal Express Corp. v. Holowecki*, the U.S. Supreme Court determined what constitutes a “charge” for purposes of exhausting administrative remedies under the federal Age Discrimination in Employment Act (“ADEA”). Federal Express instituted a policy whereby the company tied employment and compensation to the number of deliveries an employee made per day. The plaintiff/employee filed paperwork with the U.S. Equal Employment Opportunity Commission (“EEOC”), alleging that this policy was an attempt to force out those employees over the age of 40 before their retirement benefits accrued. Prior to the EEOC taking any action, the plaintiff/employee filed suit in federal district court alleging violations of the ADEA. Federal Express successfully moved to dismiss the action, claiming that the plaintiff/employee had not filed an administrative “charge” with the EEOC, and therefore had failed to exhaust her administrative remedies.

In a 7-2 decision, the U.S. Supreme Court overturned the district court’s dismissal, and held that the ADEA does not provide a static definition of what constitutes a “charge.” Instead, a “charge” is determined by the circumstances, and is any filing that can be reasonably understood as a request by the claimant for the agency to take action. Therefore, although the initial EEOC intake questionnaire may not constitute a “charge” by itself, additional paperwork filed by the claimant that can be reasonably interpreted as a request for agency action, is a “charge” for purposes of exhausting administrative remedies under the ADEA.

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